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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ANTONIA VILLAREAL,<br><br>Defendant and Appellant. | B213016<br><br>(Los Angeles County<br>Super. Ct. No. NA075253) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Arthur H. Jean, Judge. Affirmed as modified.

Marcia R. Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Antonia Villareal (appellant) of theft from an elder or dependent adult by a caretaker in violation of Penal Code section 368, subdivision (e).[1] The jury found true the allegation that the value of the property stolen exceeded $50,000. (§ 12022.6, subd. (a)(1).) The trial court sentenced appellant to the upper term of four years and an additional year for the special allegation. The trial court granted appellant 186 days of presentence custody credit, which consisted of 124 days of actual custody credits and 62 days of conduct credits.

Appellant appeals on the ground that the new formula set forth in amended section 4019 should be applied to increase her presentence conduct credits.

## PROCEDURAL HISTORY

Since appellant's appeal challenges only the award of presentence conduct credits, we do not relate the facts of her case. On October 29, 2008, appellant was convicted of the charged crime. The trial court imposed sentence on December 4, 2008, and appellant filed a notice of appeal the same day. Appellate counsel filed a brief under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) on January 25, 2010, requesting the court to make an independent review of the record. On February 4, 2010, appellant filed a motion in superior court to correct her presentence credits, which was considered and denied. On March 9, 2010, appellate counsel requested permission to withdraw appellant's *Wende* brief with leave to file a new opening brief. Permission was granted on March 11, 2010.

## DISCUSSION

### I. Appellant's Argument

Appellant contends that the amended version of section 4019 is applicable to her case.[2] Appellant points out that she has not suffered a conviction that would render her

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1 All further references to statutes are to the Penal Code unless stated otherwise.

2 The amended statute contains no saving clause that "expressly provide[s] that the old law should continue to operate as to past acts, so far as punishment is concerned." (*In re Estrada* (1965) 63 Cal.2d 740, 747 (*Estrada*).)

ineligible to receive the credits authorized by the new version of section 4019, and her case is not final.[3]

## II. Relevant Authority

Under section 2900.5, a criminal defendant sentenced to state prison is entitled to credit against the term of imprisonment for all days spent in custody before sentencing. (§ 2900.5, subd. (a).) In addition, section 4019 provides that a criminal defendant may earn additional presentence credit for good behavior and work performance. (§ 4019, subds. (b), (c).) The credits authorized by section 4019 are collectively known as conduct credit. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

Under the former version of section 4019, which was in effect in December 2008 when appellant was sentenced, a criminal defendant sentenced to state prison could accrue conduct credit at the rate of two days for every four days of actual presentence custody. (Stats 1982, ch. 1234, § 7, p. 4553.) Under the version of section 4019 that became effective on January 25, 2010, a defendant can accrue conduct credits at the rate of four days for every four days of presentence custody, as long as she is eligible.[4] (§ 4019, subd. (f).)

## III. Additional Presentence Conduct Credits Must Be Granted

The amendments to section 4019 were adopted as part of Senate Bill No. 18, which was introduced at a special session to address a fiscal emergency declared by the Governor on December 19, 2008. (Stats. 2009-2010, 3d Ex. Sess., ch. 28.) Because the amended version of the statute was not yet in effect at the time of appellant's sentencing, appellant cannot receive the increased credits unless the statute is interpreted to apply

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[3] "[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed." (*People v. Vieira* (2005) 35 Cal.4th 264, 306.)

[4] Ineligible defendants are those who are required to register as sex offenders (§ 290 et seq.) or who have been convicted of a serious felony as defined in section 1192.7, or a violent felony as defined in section 667.5. (§ 4019, subds. (b)(2), (c)(2).)

retroactively. As a general rule, a new or amended statute is presumed to operate prospectively rather than retroactively in the absence of a clear and compelling indication that the Legislature intended otherwise. (*People v. Alford* (2007) 42 Cal.4th 749, 753; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208–1209.) This principle is codified in section 3, which provides that "[n]o part of [the Penal Code] is retroactive, unless expressly so declared." (§ 3.)

Respondent argues that the language of section 3 requires the amended version of section 4019 to operate prospectively rather than retroactively because there is no explicit indication of a contrary legislative intent. However, the general rule that "when there is nothing to indicate a contrary intent in a statute it will be presumed that the Legislature intended the statute to operate prospectively . . . is not a straitjacket. Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent. It is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent." (*Estrada*, *supra*, 63 Cal.2d at p. 746; see also *People v. Alford*, *supra*, 42 Cal.4th at p. 753.) *Estrada* is binding authority and requires an examination of "all pertinent factors" in order to determine the legislative intent with respect to the amended version of section 4019. (*People v. Alford*, *supra*, at p. 753.)

In *Estrada*, the defendant was committed to a rehabilitation center after a narcotics violation, and he later escaped. He was convicted of escape without force or violence in violation of section 4530. (*Estrada*, *supra*, 63 Cal.2d at pp. 742–743.) At the time Estrada committed the offense, section 3044 provided that a person who was convicted of violating section 4530 could not be granted parole until such time as he had served at least two calendar years from and after the date of his return to prison following the conviction. (*Estrada*, *supra*, at p. 743.) After Estrada committed the offense, but before he was convicted and sentenced, sections 3044 and 4530 were amended to provide that a defendant convicted of escape without force or violence could be eligible for parole in

less than two years. (*Estrada, supra,* at pp. 743–744.) The court held that the amended versions of sections 3044 and 4530 applied to Estrada. (*Estrada, supra,* at pp. 744, 748, 751.) The court reasoned that "'[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law.'" (*Id.* at p. 745.)

There is currently a split of authority on the issue of whether the amended version of section 4019 represents a "'legislative mitigation of the penalty'" for certain crimes, and thus whether the amended version of section 4019 falls within the rule of retroactive application set out in *Estrada*.[5] (*Estrada, supra,* 63 Cal.2d at p. 745.) We believe the better reasoned decisions are those holding that the newer version of section 4019 should operate retroactively, since it constitutes an amendatory statute mitigating punishment under *Estrada*. The amended version of section 4019 clearly operates to reduce the sentences of eligible prisoners by increasing the rate at which a prisoner accrues time to offset her sentence. The fact that this mitigation of punishment is achieved by a less direct method than the statutory amendments discussed in *Estrada* is a distinction without a difference in our view. (See *People v. Hunter* (1977) 68 Cal.App.3d 389, 392–393 [applying *Estrada* to amendment allowing award of certain custody credits]; *People v. Doganiere* (1978) 86 Cal.App.3d 237, 240 [applying *Estrada* to amendment involving conduct credits].) The Legislature clearly has deemed the sentences served after

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[5] Holding in published opinions that the amended statute applies retroactively are *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963; *People v. Landon* (2010) 183 Cal.App.4th 1096, review granted June 23, 2010, S182808; *People v. House* (2010) 183 Cal.App.4th 1049, 1057, review granted June 23, 2010, S182813; *People v. Pelayo* (2010) 184 Cal.App.4th 481; *People v. Norton* (2010) 184 Cal.App.4th 408; *People v. Delgado* (2010) 184 Cal.App.4th 271; *People v. Keating* (2010) 185 Cal.App.4th 364; *People v. Weber* (2010) 185 Cal.App.4th 337; and *People v. Bacon* (2010) ___ Cal.App.4th ___ [2010 Cal.App. Lexis 1028]. Holding that the amendment applies prospectively only, are *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808; *People v. Hopkins* (2010) 184 Cal.App.4th 615; *People v. Otubuah* (2010) 184 Cal.App.4th 422; and *People v. Eusebio* (2010) ___ Cal.App.4th ___ [2010 Cal.App. Lexis 911].

reduction of the conduct credits to be "'sufficient to meet the legitimate ends of the criminal law'" for qualified prisoners. It follows that the statute is to be applied retroactively. (*Estrada*, *supra*, at p. 745.)

We therefore conclude that appellant is entitled to additional conduct credits. Under section 4019, as amended, appellant is deemed to have served four days for every two days in local custody and is therefore entitled to a total of 124 days of conduct credits in addition to the 124 days of credit for actual time served. The trial court awarded appellant 62 days of conduct credit under former section 4019. She is therefore entitled to an additional 62 days of conduct credit, for a total of 248 days of presentence credit.

**DISPOSITION**

The judgment is modified to award additional presentence credit, as discussed in this opinion. The judgment is affirmed as modified. The trial court is directed to prepare an amended abstract of judgment reflecting an additional 62 days of conduct credit for a total presentence credit of 248 days and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ